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State Aid Control in the European Union: Success or Failure?

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Claus-Dieter Ehlermann

Abstract

This Article examines some structural elements of state aid control and tries to raise the level of understanding for what is undoubtedly one of the most difficult and delicate tasks of the Commission. Part I gives a background on institutional considerations and makes recommendations for state aid control in the EU. Part II looks at the conditions for restructuring aid and asks if the “One Time, Last Time” Principle is necessary.

STATE AID CONTROL IN THE EUROPEAN UNION: SUCCESS OR FAILURE?

*Claus-Dieter Ehlermann**

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INTRODUCTION

A series of spectacular state aid decisions in 1994 has given rise to a vivid debate about the efficiency and the merits of the Commission's state aid control: the recent subsidies to ailing steel companies,¹ airlines,² and the French group,

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1. See Exemption from Community Policy on Aid to the Steel Industry, 27 E.C. BULL., no. 4, at 25-26 (1994); Decision to Initiate Proceedings Under Article 6(4) of the Steel Code, 27 E.C. BULL., no. 7/8, at 31-32 (1994); State aid, Decisions to Raise No Objection, 27 E.C. BULL., no. 9, at 21-22 (1994); Positive Final Decisions, 27 E.C. BULL., no. 9, at 26 (1994); Steel, 27 E.C. BULL., no. 10, at 22 (1994); Exemption from Community Policy on Aid to the Steel Industry, 27 E.C. BULL., no. 10, at 24 (1994); Exemption from Community Policy on Aid to the Steel Industry, 27 E.C. BULL., no. 11, at 22

Bull,³ have triggered the discussions that are particularly critical in certain Member States and in the Anglo-U.S. print media. They have even reached learned law reviews and are actively pursued before the Courts in Luxembourg. Because most of these decisions are *sub judice*, it is not appropriate to discuss individual cases. This Article will examine some structural elements of state aid control and try to raise the level of understanding for what is undoubtedly one of the most difficult and delicate tasks of the Commission.

This Article is not meant to be apologetic. The increasing public debate about state aids and control through the Commission is healthy and to be welcomed. The European Council has repeatedly stated that strict state aid control is an essential element of the efficient functioning of the Internal Market. Controversial public debates, in both institutionalized democratic fora and the non-institutionalized media, will contribute to state aid policy as much as the rapidly growing number of Court decisions, which are a visible expression of the exponentially increasing applications to the European Courts and the corresponding judicialization of state aid control.

I. INSTITUTIONAL CONSIDERATIONS

A. State Aid Control Is Unique⁴

The starting point is well known but worth recalling briefly. State aid control is traditionally unknown to states, whether they are organized as central states, federations or confederations. State aid control is a unique feature of the European Union ("EU" or "Union"). It is the experience of the Union that has inspired the successive GATT subsidy codes and its recent ex-

(1994); Decisions to Initiate Proceedings Under Article 6(4) of the Steel Aid Code, 27 E.C. BULL., no. 11, at 22-23 (1994).

2. Commission Decision No. 91/555/EEC, O.J. L 300/48 (1991) (Sabena); Commission Decision No. 94/118/EC, O.J. L 54/30 (1994) (Aer Lingus); Authorization for State Aid, O.J. C 236/2 (1992) (Iberia) and Decision of 1 March 1995, not yet published; Commission Decision No. 94/653/EC, O.J. L 254/73 (1994) (Air France); Commission Decision No. 94/662/EC, O.J. L 258/26 (1994) (Air France); Commission Decision No. 94/696/EC, O.J. L 273/22 (1994) (Olympic); Commission Decision No. 94/698/EC, O.J. L 279/29 (1994) (TAP).

3. 27 E.C. BULL., no. 10, at 24 (1994).

4. See Claus-Dieter Ehlermann, *State Aids Under European Community Competition Law*, 18 FORDHAM INT'L L.J. 411; 1994 FORDHAM CORP. L. INST. — (Barry E. Hawk ed. 1995) (forthcoming).

ports of state aid control mechanisms to the European Economic Area and to neighboring countries, in particular Central and Eastern Europe.

State aid control in the EU had to be established progressively from scratch. Neither the authors of the Treaties nor the High Authority of the European Coal and Steel Community ("ECSC") and the Commission of the European Economic Community ("EEC") could have recourse to earlier international or national practice. Even today, the understanding of state aid control is underdeveloped; compare the wealth of writing on antitrust questions to the dearth of publications on state aid issues.

One of the most obvious questions, which should intrigue economists and lawyers alike, goes to the very essence of state aid control. Why can federations function without any central monitoring mechanism? Is it the democratic process that makes state aid control superfluous? Are state subsidies de facto disciplined by the taxing and spending powers of the federation? Are there any other mechanisms that fulfill the role that state aid control by the Commission assumes in the EU?

B. *State Aid Control Is "Constitutional"*

State aid control in the EU is of constitutional nature, both with respect to substance and procedure. With the exception of common policies, agriculture, fisheries and transport, coal and steel, and shipbuilding, the Council has not enacted secondary legislation for state aid control. The compatibility of state subsidies is examined on the basis of the substantive rules of Article 92 and according to the procedural provisions of Article 93 of the EC Treaty.⁵ Article 94, which allows the Council to "make any appropriate regulations for the application of Articles 92 and 93," has remained virgin territory. In this sense, it is quite different from Article 87, which has been used abundantly for the implementation of the EC Treaty's antitrust rules.

5. Treaty Establishing the European Community, Feb. 7, 1992, arts. 92-93, [1992] 1 C.M.L.R. 573, 631 [hereinafter EC Treaty] *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

At first sight, the lack of secondary legislation enacted under Article 94 is astonishing. Would it not have been useful to refine the procedural provisions of Article 93, something that is expressly foreseen in Article 94? Why not introduce a *de minimis* rule in order to rationalize the state aid control mechanism of the EC Treaty?

On reflection and in the light of experience, the absence of Council regulations and of preceding Commission proposals is perfectly understandable. During the 1960's, the Council's inability to reach agreement blocked all attempts to legislate under Article 94. The Commission has since abstained from making proposals. The Italian Government undertook the last initiative to revive Article 94 in the first semester of 1991, when it chaired the Council. The initiative was rejected by at least half of the Member States. Recent experiences in the steel sector demonstrate that the Council is unable to deal with state aid issues in a rational manner. Expressions such as "horse trading" or "hostage taking" come to mind when one wants to qualify the Council's behavior in state aid cases. The Commission is well advised to continue its deliberate policy to avoid recourse to Article 94 as long as possible.

What are the explanations for the few exceptional situations in which the Council has enacted special rules for state aids? The case of common policies in agriculture, fisheries and transport is obvious, because state aids are market-correcting instruments *par excellence*. It is normal to fund and regulate them specifically in view of the objectives of these policies. State aid to shipbuilding are expressly mentioned in Article 92 (3) (c). The authors of the EEC Treaty acknowledged the particular character of an industry, which is exposed to world wide competition but cannot be protected by traditional trade law instruments.⁶ Subsidies for coal and steel should normally not be subject to specific rules. According to Article 4(c) of the ECSC Treaty, they are totally prohibited.⁷

6. Council Directive No. 69/262, O.J. L 206/25 (1969) and subsequent amendments.

7. Treaty Establishing the European Coal and Steel Community, art. 4(c), Apr. 18, 1951, 261 U.N.T.S. 167 [hereinafter ECSC Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987). "[S]ubsidies or aids granted by States, or special charges imposed by States, in any form whatsoever" are incompatible with the common market. *Id.*

This prohibition, however, proved to be excessive and unenforceable in the real world. After years of total disregard, it was replaced by successive state aid codes enacted under Article 95 of the ECSC Treaty which follows closely the provisions of Articles 92 and 93 of the EC Treaty. While more generous for coal,⁸ which is hardly traded between Member States, the state aid regime for steel⁹ is stricter than the Commission's practice under Article 92 for regional and restructuring aid in general.¹⁰ In practice, this has not led to outright prohibitions but to derogations granted according to Article 95 of the ECSC Treaty and therefore legally legitimate, but highly unsatisfactory from other perspectives.

C. State Aid Control Is a Natural Commission Monopoly

According to Article 93, state aid control is entrusted to the Commission and to the Commission alone. The only exception is to be found in Article 93(2), which allows the Council, acting unanimously, to declare a state aid to be compatible "if such a decision is justified by exceptional circumstances." This safeguard clause has been very rarely used, and since the early 1960's, never outside the agricultural sector.

As a direct result of the EC Treaty, the Commission's responsibility for state aid control is fundamentally different from its position in antitrust matters. Articles 85 and 86 do not establish a Commission monopoly to implement these prohibitions, but leave the definition of its functions to Council regulations to be enacted under Article 87. The Council has done so in Regulation No. 17/62¹¹ (and its followers for different modes of transport).¹² Council Regulation No. 4064/89¹³ has established the Commission's responsibilities in the field of merger control.

Antitrust specialists know about the vivid debate whether the Commission's monopoly to implement Article 85(3) should be maintained or not. It is remarkable that such a debate is con-

8. See Commission Decision No. 3632/93/ECSC, O.J. L 329/12 (1993).

9. Commission Decision No. 3855/91/ECSC, O.J. L 362/57 (1991).

10. Community Guidelines No. 94/C 368/05, O.J. C 368/12 (1994).

11. [1962] O.J. Spec. Ed. 87.

12. Council Regulation No. 1017/68, O.J. Spec. Ed. 302 (1968) (inland transport); Council Regulation No. 4056/86, O.J. L 378/4 (1986) (maritime transport); Council Regulation No. 3975/87, O.J. L 374/1 (1987) (air transport).

13. Council Regulation No. 4064/89, O.J. L 257/14 (1990).

spicuously absent in the state aid sector. Nobody has ever contested that the EU needs an arbiter who ensures at the Union level that state aid rules are respected. Nobody has ever suggested that this function could be shared with or delegated to Member States, as is suggested for individual decisions under Article 85(3).

D. Should State Aid Control Be Entrusted to an Independent European Competition Office?

The recent controversies about spectacular state aid decisions have produced one new idea. State aid control should be entrusted to an independent European Competition Office. The source of inspiration is obvious. It is the traditional German request to establish an independent European Cartel Office to decide on antitrust matters. The model for such a European Cartel Office is the highly successful and respected Bundeskartellamt in Berlin.

This Article will not discuss the pros and cons of an independent EC antitrust agency. Suffice it to say that there are good reasons to promote actively the idea, even if its realization appears to be premature for the next couple of years. These reasons have been set forth elsewhere.¹⁴

The proposal to entrust state aid control to an independent European Competition Office, though at first sight similar, is of a totally different nature. It is also totally unrealistic, and thus not worth serious consideration.

What are the reasons for this negative assessment? Antitrust rules are addressed to enterprises. Since the Second World War they have spread to many parts of the world. Since the end of the Cold War, they have expanded with extraordinary speed in Central and Eastern Europe, Asia, and Latin America. Their implementation is, almost without exception, entrusted to administrative agencies more or less independent of governments or courts.¹⁵ The EU is one of the few exceptions, which might disappear over time.

14. Claus-Dieter Ehlermann, *Reflections on a European Cartel Office*, 32 COMMON MKT. L. REV. — (forthcoming 1995).

15. For a survey of the way in which national competition laws are implemented in the EU's Member States, see P. BARTODZIEJ, *REFORM DER EG-WETTWEBERBSAUFICHT UND GEMEINSCHAFTSRECHT* 123-26 (1994).

As we have seen in the beginning, the situation of state aid control is totally different. State aid rules are not addressed to enterprises, but to states. They limit the freedom of governments, even of parliaments, to grant financial advantages to certain sectors of their economy, irrespective of the technique that may be used, including tax and social security rebates. State aid control is therefore a serious and highly sensitive interference with national sovereignty. It is, as we have explained, unique to the EU.

It is not realistic to assume that this control will be entrusted to a non-political expert panel, such as a Cartel or Competition Office. Because of its very nature, it will remain the responsibility of an essentially political body, such as the Commission.

E. Shrinking Margins of Political Discretion

This statement implies that state aid control requires a wider margin of political discretion than decisions in antitrust matters. It should be noted, however, that this margin is not without limits, as it is exercised under the vigilant eyes of the judges in Luxembourg. Even more important is the fact that the originally wide margin of discretion is constantly shrinking. Two factors work to limit discretion. The first factor is the Commission's own decision making, whether in the form of general statements, such as guidelines, frameworks, notices, etc., or of individual decisions. The second is the jurisprudence of the European Courts. Since 1993, the Court of First Instance has jurisdiction over many state aid cases,¹⁶ and will examine even more thoroughly than the Court of Justice the underlying facts and their economic appreciation by the Commission. It has already been mentioned that applications against state aid decisions are rapidly increasing in number and in sophistication. Judicial review is one of the fastest-growing sectors, if not the fastest-growing, of the Courts' activities in Luxembourg.

F. Increasing Transparency

As in the case of the European Cartel Office, the plea for an

16. For the jurisdiction of the Court of First Instance, see Council Decision No. 88/591/ECSC, EEC, EURATOM, O.J. L 319/1 (1988), *corrigendum* O.J. L 241/4 (1989), *amended by* Council Decision No. 93/350/EURATOM, ECSC, EEC, O.J. L 144/21 (1993), *amended by* Council Decision No. 94/149/ECSC, O.J. L 66/29 (1994).

independent State Aid Control Agency is motivated at least in part by a perceived lack of transparency. The situation in the Union, however, is more transparent than in any other part of the world, as it is the only place in which all state aid projects are subject to a procedure of prior and systematic scrutiny. In addition, transparency within the EU will increase further over the coming years. The reasons are both political and legal. There is growing demand by Member States for information and explanation of the Commission's decision making practice with respect to state aids granted by other Member States; this demand is reinforced by the overall debate on transparency following the Maastricht Treaty negotiations. Another political factor is the Commission's determination to pursue its policy of issuing more guidelines, frameworks, notices, etc. These documents explain in advance how the Commission will react to certain categories of state aid projects such as regional aid, aid in favor of research and development, the protection of the environment, small and medium sized enterprises, employment, etc.

Legal requirements for increased transparency will be generated by the Courts in Luxembourg, in particular by the Court of First Instance. Observers of the Courts will confirm that the recent jurisprudence shows a tendency to align the procedural rights of private parties in the state aid sector on those which they enjoy in antitrust matters. This tendency is the procedural expression of a fundamental shift that has occurred almost imperceptibly over the last years. Aid granted by a Member State is no longer controlled exclusively or principally in the interest of other Member States, but also, and perhaps even more so, in the interest of the competitors of the intended beneficiaries of the aid. The original macroeconomic approach of the authors of the EEC Treaty is being supplanted progressively by a microeconomic perspective, similar to that which has always dominated substantive and procedural antitrust law.

G. The EU's Interest in Exporting State Aid Control

Because of the high degree of transparency of state aid control in the EU, which will continue to increase in the future, the EU has every interest in advancing the scrutiny of subsidies at the international level. This is true of both substance and procedure, i.e. monitoring. If such rules do not exist or if they are not

effectively implemented, non member countries will benefit gratuitously from the EU's internal control mechanism. Such a situation is clearly not desirable. It might in the end even jeopardize the correct functioning of the EU's own state aid control. Contrary to commonly held views about the risks of subjecting oneself to international rules, the EU has nothing to lose and can only win in exporting its own state aid discipline to other parts of the world.

The EU has successfully done so, through the agreement on the European Economic Area ("EEA"), the so-called Europe Agreements with Central and Eastern European Countries ("CEECs"), and the new Subsidy Code agreed during the Uruguay Round and the most recent Organisation for Economic Co-operation and Development ("OECD") Shipbuilding Agreement.

The most ambitious exercise has been the establishment of the EEA through which all the EU's state aid rules and procedures have been exported en bloc to those EFTA countries which have joined the EEA. Identical EEA state aid control rules are implemented by the EFTA Surveillance Authority ("ESA"), the so-called Second Pillar. At the beginning of this year, ESA had a stock of some 400 state aid cases, most of which were transferred to the Commission when Austria, Finland, and Sweden joined the EU and when simultaneously the non-EU part of the EEA and ESA's central shrunk to Norway, Iceland, and Liechtenstein.

A hardly less ambitious operation has been adopted in the Europe Agreements. The CEECs will respect substantive state aid rules that correspond in principle to those applicable within the EU in similar situations. They will not, however, set up among themselves a plurinational control mechanism like ESA. They will have to ensure the respect of their international obligations towards the EU through strictly national control mechanisms. Whether such a mechanism can be implemented effectively remains to be seen. In the light of the EU's own internal experience, it seems almost impossible. The CEECs, however, have one powerful incentive to succeed. In implementing correctly the state aid disciplines of the Europe Agreements, they can avoid protective measures that the EU might otherwise apply to their exports to the EU. The Europe Agreements place thus a high premium on self-discipline.

In the new multilateral agreement on subsidies and countervailing measures negotiated during the Uruguay Round and to be monitored by the World Trade Organisation, the EU definition of subsidy was adopted. European Union state aid rules and procedures have largely gained admittance with respect to both actionable and non-actionable subsidies, in particular those regarding regional aid.

The recent agreement negotiated in the framework of the OECD on normal competitive conditions in the commercial shipbuilding and repair industry is another example of the convergence of internal state aid policy with external trade policy. Lack of an effective commercial defense instrument against unfair competition on the world market in that sector has obliged the EU for several decades to pursue a very costly sectoral state aid policy, allowing production aid for shipbuilding. By sacrificing this policy, which in any case ran contrary to its general aversion to sectoral aid, the EU obtained, *inter alia*, the institution in the same agreement of a code protecting it against injurious pricing by shipbuilders in the signatory countries.

H. *Strengthening DG IV's Overall Responsibility for State Aid Control*

While there is no realistic prospect of entrusting state aid control in the EU to an independent European Competition Office, strong arguments plead in favor of a reorganization of responsibilities within the Commission. Contrary to antitrust matters, which are all attributed to the Directorate General for Competition ("DG IV"), state aid control is traditionally divided among of series of Commission departments. State aids fall within the responsibility of DG IV, with the exception of agricultural aids examined by the Directorate General for Agriculture ("DG VI"), transport aids by the Directorate General for Transport ("DG VII"), fisheries aids by the Directorate General for Fisheries ("DG XIV"), and coal aids by the Directorate General for Energy ("DG XVII"). The explanation for this division of tasks is probably more historical than logical.

An argument may be made for combining state aid monitoring with the overall responsibilities for a given common policy, like agriculture, fisheries, and transport. This argument, however, is only convincing with respect to state aid disciplines that are sector-specific and therefore intimately linked to the particu-

larities of a common policy. It does not carry weight if and in so far as horizontal rules are to be applied, such as aid in favor of disadvantaged regions, research and development, the environment, small and medium-sized enterprises and, most of all, rescue and restructuring aid. In particular, rescue and restructuring operations should in the future be attributed exclusively to DG IV, rather than divided among Commission departments.

Concentration in DG IV would guarantee coherence and consistency. It would also diminish the influence of sectoral considerations. It would strengthen DG IV's position among Commission departments, a consideration that is worth bearing in mind if one thinks of the medium-term perspective of its weakening through the establishment of an independent European Cartel Office for antitrust matters.

II. *RESCUE AND RESTRUCTURING AIDS*

The recent upsurge of critical comments are not directed against the day-to-day monitoring of state aids by the Commission. The criticism focuses almost exclusively on a few spectacular decisions approving large sums of money injected into certain steel companies, airlines, and the French group Bull. While attitudes of governments are relatively moderate, protests from competitors, particularly from the private sectors, are aggressive. Competitors criticize vociferously the levels of aid, the conditions attached and the recidivist character of some of the restructuring operations.

A. *The Traditional Conditions for Restructuring Aids*

The Commission's traditional practice with respect to rescue and restructuring aid is many years old, even if it has only recently been clarified in guidelines. In July 1994, the Commission adopted general guidelines for rescuing and restructuring firms in difficulty.¹⁷ In November 1994, it supplemented these guidelines with a communication that applies them specifically to the aviation sector.¹⁸

Rescue aids are allowed as a short-term, transitional device

17. Commission Guidelines, O.J. C 368/12 (1994).

18. Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the Aviation Sector, No. 94/C 350/7, O.J. C 350/5 (1994).

preceding a restructuring operation. They do not merit closer examination in the context of this Article.

Restructuring aid is subject to a series of conditions which have been expressly approved in principle in a recent decision of the Court of Justice.¹⁹ The most important of these conditions are:

- 1) A restructuring plan which restores the long term viability of the enterprise within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions.
- 2) Aid should not be higher than strictly necessary to enable restructuring. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan. Aid should not provide the enterprise with cash which can be used for aggressive, marked distorting activities. Aid should not go to finance new investment (like acquisitions) not required to the restructuring. Aid for financial restructuring should not unduly reduce the enterprise's financial charges.
- 3) In case of "a structural excess of production capacity in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry . . . by irreversibly reducing or closing capacity."²⁰

A similar counterpart will normally not be required if there is no structural excess capacity. The aid will be conditioned only by the obligation not to expand capacity during the implementation of the restructuring plan, except where essential for restoring viability. Capacity reductions in case of structural excess of production capacity will be less important if the restructured enterprise is situated in assisted regions or is a SME.

While the first and second conditions are obvious, the third is not. It has given rise to acrimonious debates among governments and industrialists in the different restructuring rounds, for steel and shipbuilding. Though already accepted in principle by the Court of Justice in earlier judgments and in particular in a recent decision,²¹ the amount of capacity reduction will cer-

19. *Spain v. Commission*, Joined Cases C-278, 279 & 280/92, [1994] E.C.R. I-4103, 4167, ¶ 65.

20. *Commission Guidelines*, O.J. C 368/12, at 16, ¶ 3.2.2.ii (1994).

21. *Spain v. Commission*, [1994] E.C.R. I-4103, 4167, ¶ 67. "The Commission is

tainly be one of the most vigorously argued issues before the Judges in Luxembourg. The reason is simple. The discussion about the so-called counterpart goes to the very essence, the *raison d'être*, of state aid control in the EU. Does state aid control protect only or mainly the interests of Member States? Or does it protect also and perhaps even primarily the interest of competitors? Over the years, the emphasis has changed. Originally concerned almost exclusively with Member States, today state aid control is more and more understood as protecting competitors against distortions of competition. It is obvious that the counterpart of a restructuring aid grows in significance and in importance if it is seen as a contribution not only to the improvement of the overall structure of the market, but also to the acceptability of the grant to the competitors. In this perspective, a counterpart is not only required in case of a "structural excess of production capacity in a relevant market in the European Community,"²² but also in the absence of such a situation. There remains of course the question what the counterpart should be in such a case. The answer should be a reduction of market share. A cut in production capacity might not necessarily be the most appropriate means to achieve this end.

B. *Privatization as a Condition?*

It is remarkable that the Commission's July 1994 guidelines do not mention one condition that has become very important in the most recent restructuring operations, i.e., privatization. Privatization as a condition for the approval of restructuring aid is obviously a delicate issue. The Commission can take note of the commitment of a Member State to privatize the enterprise to be restructured. Through the viability condition, such a commitment can even become a binding element of the Commission's decision.²³

Can the Commission require privatization without a prior undertaking by the Member State? At first sight, the principle of

right in considering that, in order to be declared compatible with Article 92(3)(c) of the Treaty, aid to undertakings in difficulty must be bound to a restructuring programme designed to reduce or redirect their activities." *Id.*

22. Commission Guidelines, O.J. C 368/12, at 16, ¶ 3.2.2.ii (1994).

23. *Air France*, O.J. L 254/73 (1994); *Air France*, O.J. L 258/26 (1994); *Sabena*, O.J. L 300/48 (1991).

neutrality²⁴ seems to oppose this idea. The viability criterion, however, may again justify it. Whatever one may think of the reality of the neutrality principle, special circumstances will be necessary to insist on such a condition. The most obvious candidates for privatization requests are recidivists, i.e. public enterprises that have already benefitted from restructuring aid, but that have to be supported again by further grants of state aid. In such a case, the Member State concerned has demonstrated that it is not able to assure viability without the strong presence of a private partner.

It is obvious that privatization can diminish the amount of aid necessary for restructuring. A lower level of aid leads logically to a smaller counterpart, like a smaller reduction of capacity. Such a smaller reduction of capacity can be vital for the survival of the enterprise to be restructured, if bigger cuts would jeopardize its future viability. This is another possible contribution of privatization to the success of rescue and restructuring operations.

C. *The "One Time, Last Time" Principle*

Another condition which has attracted considerable attention during the last months is only mentioned en passant in the July 1994 general guidelines: "Like rescue aid, aid for restructuring should normally only need to be granted once."²⁵ It is, however, discussed in detail in the November 1994 communication on state aids in the aviation sector. After referring to the Wise Men's (*Comité des Sages*) Report of February 1994 which had recommended a clear and genuine "one time, last time" condition, the Commission declared:

Some ideas of the Comité, however, cannot be accepted by the Commission. It is not possible for the Commission to change or disregard the EC Treaty. This means, in particular, that the condition that the aid is the last one has, of course, to be interpreted in conformity with Community law. This implies that such a condition does not prevent a Member State from notifying a further aid to a company which has already been granted aid. According to the Court of Justice case law, in such a case the Commission will take all the relevant ele-

24. EC Treaty, *supra* note 5, art. 222.

25. Commission Guidelines, O.J. C 368/12 at 16, ¶ 3.2.2 (1994).

ments into account. An important element in the Commission's assessment will be the fact that the company has already been granted State aid. Therefore, the Commission will not allow further aid unless under exceptional circumstances unforeseeable and external to the company.²⁶

The practical importance of this statement is obvious. It has been demonstrated by the prospect of a new rescue and restructuring operation for the Spanish airline Iberia²⁷ and by the public controversies between the Commissioner for Transport in 1993-94, Marcelino Oreja, and the Commissioner for Competition, Karel Van Miert.

It is not our intention to analyze the precise meaning and the legal merit of the different elements of the Commission's statement. Only one aspect should be highlighted in the context of this Article. The "one time, last time" principle is relatively new. It has found its most solid expression in the December 1993 conclusions of the Council²⁸ giving its assent to the recent restructuring aids in the steel industry. At the request of the Council, all Commission decisions authorizing restructuring aid to certain steel companies are subject to the condition that the Member State concerned "shall not request any further derogation under Article 95 . . . should a return to viability not be achieved by [the end of the restructuring period]." The principle is also to be found by the new multilateral agreement on subsidies and countervailing measures negotiated during the Uruguay Round. Article 5 of the agreement enjoins members not to cause "serious prejudice to the interests of another member." Article 6 specifies that serious prejudice shall be deemed to exist in the case of subsidies to cover operating losses sustained by an enterprise "other than one-time measures which are non-recurrent and cannot be repeated for that enterprise."²⁹

Compared with these texts, the Commission's statement in the November Communication on state aids in the aviation sector seems weaker, as it opens the door for second-time aid in

26. Commission guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aid in the aviation sector, O.J. C 350/5 at 7, ¶ 5 (1994).

27. The Commission decided on March 1, 1995 to open an investigation into a new aid package for Iberia (decision not yet published).

28. 26 E.C. BULL., no. 12, at 50.

29. Council Decision No. 94/800/EC, O.J. L 336/1, 158 (1994).

case of exceptional circumstances unforeseeable and external to the company. Much depends, however, on the interpretation and practical implementation of this proviso. It would express a common sense principle if it were applied only to real *cas de force majeure* situations, like the Gulf War. It would, however, go much further if the deterioration of the value of a currency were qualified as unforeseeable. Currency fluctuations are normal and have to be taken into account by economic operators. The Commission should allow only real *cas de force majeure* exceptions. If it acted otherwise, it would de facto destroy the "one time, last time" principle in the aviation sector.

Whatever happens with respect to aviation, the overall trend of state aid monitoring has become tighter. This is largely attributable to Karel van Miert, the Commissioner responsible for transport when *Sabena*, the leading case, was decided³⁰ and who defended the Commission's position on steel aids in the Council during the last steel crisis.

D. *Must There Always Be a "One Time"?*

The "one time, last time" principle leads to a more fundamental consideration. Why should there be a "one time?" Could the Commission simply refuse the authorization of restructuring aid, even if all normal conditions for such an authorization, namely restructuring plan leading to viability, counterpart, aid limited to the strict minimum needed for restructuring, etc., are met?

In order to be perfectly clear, it must be emphasized that the question does not address the situation in which an enterprise cannot be made viable (taking into account the counterpart that is required to compensate the amount of aid necessary for restructuring). In such a situation, the Commission will not authorize the aid.

Our question is based on another hypothesis. The ailing enterprise can be made viable; the necessary counterpart can be provided. Might the Commission nevertheless say no?

From a strictly legal point of view, the answer is affirmative. The Commission is entitled to refuse the authorization. Article 92 does not declare that restructuring aids "shall be compatible

30. *Sabena*, O.J. L 300/48 (1991).

with the common market.”³¹ Restructuring aids have to be justified under Article 92(3) according to which certain aids “may be considered to be compatible with the common market.” The vast majority of these aids can only be approved under Article 92(3)(c), which provides for authorization of “aid to facilitate the development of certain economic activities . . . where such aid does not adversely affect trading conditions to an extent contrary to the common interest.”³² The Commission could declare that restructuring aid in a certain sector does affect trading conditions to an extent contrary to the common interest, in view of the particular economic situation in the sector.

It is remarkable that the Commission has never done so. The explanation is clearly political. The declaration that restructuring aids in a certain sector are per se against the common interest would clearly mean an industrial policy for that sector. The Commission is, however, opposed to sectoral industrial policy. It is committed to establishing horizontal rules in order to promote the competitiveness of European industry. The existing practice with respect to restructuring aids is part of that horizontal framework. It is therefore useful to maintain it.

But does this reasoning also apply to those sectors in which the EU has adopted sectoral policies and in which even the Council has been active as a legislator? If the existing state aid discipline for Steel (the so-called Steel Aid Code³³) does not allow a certain type of restructuring operation, why has the Commission asked the Council for its assent, under Article 95 of the ECSC Treaty, to derogate from the Code and to authorize these operations nevertheless? Again, the explanation is not legal, but political. Every Member State has the right to notify aid, even incompatible with the Code, and ask for a derogation. The Commission, however, has no legal obligation to follow this request. It has done so in part because of its general attitude to restructuring aid under the EC Treaty. It could, however, perfectly well change its mind in view of the particularities of the steel sector and the ECSC Treaty, in particular its fundamental prohibition of state aids in Article 4c. To do so, the Commission would need to avoid the argument that, having asked for deroga-

31. EC Treaty, *supra* note 5, art. 92(2).

32. *Id.* art. 92(3)(c).

33. Commission Decision No. 3855/91/ECSC, O.J. L 362/57 (1991).

tions for a certain number of enterprises, it would discriminate against the remaining companies which are in difficulties but have not yet had a chance to benefit from a restructuring operation. The new policy would therefore have to be announced sufficiently in advance, allowing for a transitional period during which restructuring operations eligible for a derogation under the existing practice would still be entitled to a derogation from the steel aid code.

CONCLUSION

In view of the experience of recent years, the Commission would be well advised to take that courageous step. Otherwise, it is almost certain to be confronted with a new wave of restructuring operations in a few years time, as Martin Bangemann and Karel Van Miert have recently warned on several occasions. Whether this wave could be resisted in applying the "one time, last time" principle is doubtful, as it depends on the enterprises to be restructured and on the interpretation of the principle with respect to the period covered. Why is it likely that the steel sector will see a new wave of restructuring operations in case of a serious economic downturn? One of the most important reasons is the existence of large publicly controlled steel companies. It is our firm conviction that publicly controlled enterprises face particular difficulties in highly competitive markets and that they are therefore likely candidates for repetitive restructuring operations. It remains for another article, however, to discuss the competitive advantages and disadvantages of public enterprises or the reality of the neutrality principle of the EC Treaty.